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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALFONSO LOAIZA,<br><br>Defendant and Appellant. | B258115<br><br>(Los Angeles County<br>Super. Ct. No. PA061499) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed as modified.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen, Marc A. Kohm and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Alfonso Loaiza was convicted following a jury trial of four counts of perjury (Pen. Code, § 118, subd. (a)), and sentenced as a second strike offender to an aggregate state prison term of 13 years. On appeal Loaiza contends he was denied the effective assistance of counsel in violation of his federal and state constitutional rights. He also contends the trial court erred in imposing $1,200 restitution and parole revocation fines. We modify the fines and otherwise affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Evidence of Loaiza's False Statements*

Loaiza was charged with falsely declaring under penalty of perjury on four separate applications to the Department of Motor Vehicles (DMV) submitted between July 19, 2005 and October 11, 2006 that he had not applied for a driver's license or identification card in California or any other state or country using a different name within the past 10 years. In fact, on January 7, 1997, February 23, 1998, June 16, 1998, March 16, 2000 and September 12, 2000 Loaiza had applied for either a California driver's license or identification card using aliases. In addition, prior to the 10-year period—in September 1993, July 1994 and July 1995—Loaiza had filed additional applications with the DMV using false names and addresses. The People presented DMV manager Anna Recalde, in part as an expert witness, who explained the procedures used by the DMV to process license and identification card applications and established through that witness's testimony, exhibits (authenticated copies of the various applications) and stipulation that Loaiza had actually submitted the applications at issue in the four counts of perjury, signed under penalty of perjury, as well as the earlier applications using false names.

Loaiza testified on his own behalf. He admitted he had submitted applications to the DMV using aliases in the past. However, when he signed the 2005 and 2006 applications, which used his own name and social security number and stated under penalty of perjury that he had not used a different name on a DMV application within

10 years, he thought the statement was true because he believed the earlier applications had been made more than 10 years earlier.

During his testimony Loaiza admitted he had pleaded guilty to assault with a deadly weapon in 2000 as part of a negotiated agreement that included dismissal of charges of perjury regarding several of his earlier DMV applications. He also acknowledged he had been convicted of possession of marijuana for sale in 2000. He was released from prison in 2005, shortly before the first of the DMV applications at issue in the current trial. Loaiza also admitted he had pleaded no contest to a charge of burglary in 2007 and had failed to appear at a pretrial hearing in this case while released on bail and had been a fugitive for three and one-half years before being apprehended. He explained he had appeared in court while on bail a number of times (13 according to a stipulation entered after his testimony), but did not appear at the pretrial hearing because he did not want to go back to prison for something he did not do.

2. *Defense Counsel's Alleged Deficiencies*

On appeal Loaiza criticizes defense counsel's trial performance in four areas: the failure to establish facts concerning Loaiza's background that had been described in opening statement; counsel's cross-examination of Recalde, the People's witness from the DMV; his handling of evidence of prior uncharged crimes; and closing argument.

a. *Opening statement*

In his opening statement Loaiza's counsel introduced the defense theme that Loaiza had not intended to deceive anyone when he declared in the 2005 and 2006 applications that he had not applied for a license under any other name during the past 10 years; rather, he believed the statement was true and had simply been mistaken as to how long ago he had applied using different (and false) names. Counsel also told the jury he would present evidence that Loaiza had witnessed his older brother's death in a motorcycle accident when he was 13 years old, an event that altered his life. Thereafter, Loaiza began using drugs, dropped out of school and committed various crimes, including applying during the 1990's for driver's licenses in other people's names to earn

money to support his drug habit. Loaiza ultimately went to prison, the jury was told, and was a changed man when released in 2005. At that point he needed a driver's license to seek employment, which resulted in the first application at issue in this case.

During his direct examination of Loaiza, however, defense counsel failed to elicit any testimony regarding the death of Loaiza's brother or Loaiza's subsequent depression and use of drugs. In addition, although Loaiza testified he applied for a driver's license when he was released from prison in 2005, he did not assert he needed a license to find employment and support his family. Counsel also did not have Loaiza explain why he had submitted four different applications during the 15-month period between July 2005 and October 2006.

b. *Cross-examination of Recalde*

Defense counsel asked Recalde, the People's DMV witness, on cross-examination whether Loaiza had used the same social security number on the 2005 and 2006 applications at issue in the case—a point not raised during her direct examination. Recalde replied, "I don't know. I didn't look at each one to see if it was the same number." Showing her the applications, counsel asked, "Does it look like he used the same social security number?" Recalde responded, "Nope," explaining that the first three numbers on the July 19, 2005 application were "555," but were "551" on the September 27, 2005 application and either "557" or "551" on the October 11, 2006 application. The remaining six numbers on the three applications were identical. (There was no social security number on the March 13, 2006 application.) Counsel asked if, perhaps, Loaiza's writing was just sloppy, but received no answer to the question.

c. *Prior uncharged crimes*

Loaiza's counsel had him testify on direct examination that he pleaded guilty to assault with a deadly weapon in 2000 as part of a negotiated agreement that perjury charges involving earlier DMV applications would be dismissed. On cross-examination the prosecutor had Loaiza confirm he had been convicted not only of assault with a deadly weapon but also for the sale of marijuana in 2000 and second degree (commercial)

burglary in 2007. Defense counsel made no effort to exclude evidence of any of these three prior felony convictions or to prevent the jury from learning that earlier perjury charges against Loaiza relating to fraudulent DMV applications had been dismissed as part of a plea agreement.

d. *Closing argument*

At the outset of his closing argument defense counsel referred to "an old saying that I believe fits this case. And that is, 'to err is human, and forgiveness is divine.'" Counsel then stated the facts in the case were essentially undisputed, that is, what happened in terms of the applications themselves; the issue was Loaiza's intent. Counsel emphasized, as stated in the court's instructions, a mistaken belief the incorrect statement on the application was true was a complete defense to the perjury charges and insisted Loaiza "honestly and actually believed that he could answer that question the way he did; however, he made a mistake in believing what he assumed to be true, that all of the licenses were done in the early '90's." Counsel also stated Loaiza needed to apply for a driver's license when he was released from prison in order to find employment, a fact that had not been established during Loaiza's testimony, which the prosecutor noted in her final argument.

## DISCUSSION

1. *Governing Law and Standard of Review*

To establish ineffective assistance of counsel under either the federal or state constitutional guarantee, a defendant must show """that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant."""" (*In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . .

must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

There is a presumption the challenged action or inaction "'might be considered sound trial strategy'" under the circumstances. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 689, 694; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*Gamache*, at p. 391; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) Moreover, even when error is shown, reversal is improper unless there is a "reasonable probability" that, absent the error, the defendant would have received a more favorable result. (*In re Champion* (2014) 58 Cal.4th 965, 1007; *Gamache*, at p. 391.)

In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Champion*, *supra*, 58 Cal.4th at p. 1007, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *In re Alvernaz* (1992) 2 Cal.4th 924, 945; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different. (*Champion*, at p. 1007; *Mesa*, at p. 1008.)

2. *Loaiza Was Not Prejudiced by the Alleged Deficiencies in His Counsel's Performance*

The critique by Loaiza's appellate counsel of trial counsel's performance is not without some merit. Although the defense theme of innocent mistake/lack of intent to deceive was clearly presented, with different choices defense counsel might have been able to present Loaiza as a somewhat more sympathetic, and hence more credible, individual. Nonetheless, in the face of the evidence presented by the People, none of the

alleged deficiencies identified, whether considered individually or cumulatively, deprived Loaiza of his constitutional right to the effective assistance of counsel.

a. *Opening statement and the direct examination of Loaiza*

We agree defense counsel should not have described Loaiza's troubled background and descent into criminal activity as a youth in the opening statement and then failed to establish those facts through his client's testimony. Although the evidence might have been excluded as irrelevant or counsel may have reasonably concluded as a tactical matter it was better not to invite cross-examination into Loaiza's personal history, those evaluations should have been made before trial began. Nonetheless, given the minimal significance of this information to the issue of Loaiza's intent in submitting false DMV applications in 2005 and 2006, counsel's failure in this regard is hardly comparable to a "broken promise" that the defendant would testify or an alibi witness be presented, shortcomings that had occurred in the cases cited by Loaiza in his appellate briefs. (See, e.g., *Williams v. Woodford* (E.D.Cal. 2012) 859 F.Supp.2d 1154, 1171 ["'[w]hen a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made'"]; see generally *People v. Stanley* (2006) 39 Cal.4th 913, 955 ["[f]orgoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case"].) Moreover, the narrative that Loaiza was a changed man after his release from prison in 2005—the only reason to discuss his earlier difficulties and the reasons for them—was fundamentally eroded by evidence of his 2007 burglary conviction.

Loaiza also suggests in passing that trial counsel was ineffective because he did not ask him to explain why he had made four separate applications to the DMV during a 15-month period—an issue also not addressed by his counsel in either opening statement or closing argument. The record does not disclose any reason for this omission. On a

direct appeal we must assume counsel made a tactical choice, suggesting the answer to those questions would not have been helpful to Loaiza's honest mistake defense. (See *People v. Gamache, supra*, 48 Cal.4th at p. 391.)

b. *Cross-examination of Recalde*

On this record defense counsel's attempt to have the People's DMV witness confirm that Loaiza used not only his real name but also the same social security number on the three applications in which a number was included—to establish that Loaiza was not attempting to mislead or deceive anyone with his 2005 and 2006 applications—appears to be a rational tactical decision. (See *People v. Gamache, supra*, 48 Cal.4th at p. 391.) The applications were admitted into evidence and available for the jury to view. Notwithstanding Recalde's interpretation of those numbers, our own review of the exhibits indicates the first three numbers on all three applications were, in fact, identical, "551." The dash inserted between the first grouping and second grouping of numbers in the social security number on two of the exhibits apparently led Recalde to read the "1" as possibly a "5" or a "7." Although counsel perhaps could have more aggressively questioned Recalde or waited for an answer to his question about Loaiza's sloppy handwriting, the point he apparently wanted to make, which Loaiza confirmed during his direct testimony, was adequately presented for the jury's consideration. It is not a fair reading of the record to contend, as Loaiza does now, that his counsel provided ineffective assistance through this cross-examination by eliciting damaging testimony not otherwise part of the prosecution's case.

c. *Prior uncharged crimes*

Defense counsel allowed evidence of Loaiza's three felony convictions (the 2000 aggravated assault and drug charge and the 2007 burglary) without challenge. In fact, the assault with a deadly weapon conviction was addressed during Loaiza's direct testimony. The trial court, mindful of its obligation to assure a defendant receives a fair trial, noted during a discussion outside the presence of the jury that it would generally undertake an Evidence Code section 352 balancing analysis if any issue was raised whether a

conviction was properly introduced for impeachment purposes. Loaiza's counsel confirmed it was part of the defense strategy to allow those convictions to be introduced, and the court stated it would give the appropriate limiting instruction regarding use of prior convictions.

Although Loaiza now questions his trial counsel's decision, he fails to suggest any basis for sustaining an objection under Evidence Code section 352 to use of one or more of those felony convictions for impeachment purposes;[1] and we are unable to fathom any legitimate ground for excluding them for that limited use. (See *People v. Weaver* (2001) 26 Cal.4th 876, 931 [counsel has no duty to make frivolous or futile objections]; *People v. Memro* (1995) 11 Cal.4th 786, 834 [same].) Plainly, no cognizable prejudice resulted from the introduction of fully admissible evidence.

During Loaiza's direct testimony his counsel also had him explain that his 2000 aggravated assault conviction was the result of a negotiated plea agreement that included dismissal of several perjury counts based on the earlier false DMV applications. The jury would necessarily have learned of those prior applications, both to prove the falsity of Loaiza's statement that he had not applied for a license or identification card under a different name within the past 10 years and, with respect to those applications that were outside the 10-year window, as evidence under Evidence Code section 1101, subdivision (b), of prior conduct to establish his false statements in 2005 and 2006 were intentional. Nonetheless, on appeal Loaiza argues the fact the false applications resulted in perjury charges that were dismissed as part of a plea bargain was arguably inadmissible and should not have been elicited by Loaiza's counsel. Advising the jury of

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[1] In his reply brief Loaiza states, without any additional elaboration, that defense counsel "did have a principled basis for objection to admission of the prior convictions under Evidence Code section 352," citing *In re Jones* (1996) 13 Cal.4th 552, 582. The *Jones* case, however, did not involve impeachment with prior convictions involving moral turpitude or section 352 balancing under *People v. Castro* (1985) 38 Cal.3d 301, but rather the prosecutor's use of a prior uncharged shooting incident to discredit defendant's testimony that he had never owned a handgun and his involvement with such weapons was limited to pawning and redeeming handguns that belonged to others.

those prior perjury charges, he contends, undermined the defense strategy of mistake, permitting the prosecutor to argue in closing that one would have expected Loaiza to be "super careful" in future applications, not careless as he had testified.

Loaiza's suggestion of prejudice, however, is vastly overstated. Whether or not there actually had been perjury charges filed against Loaiza based on those prior applications, he acknowledged—and the jury was well aware even without that admission—he had intentionally submitted false DMV applications prior to the time he went to prison in 2005. Loaiza's credibility in insisting he believed those applications were more than 10 years old was severely damaged by the undisputed evidence of his own prior conduct, as well as by his less-than-forthright demeanor on the witness stand, which the prosecutor also emphasized to the jury, and his decision to flee while on bail pending trial. It is not reasonably probable Loaiza would have obtained a more favorable result—an acquittal—had his counsel not had him describe the details of the 2000 plea bargain.

d. *Closing argument*

Finally, we agree closing argument by Loaiza's counsel was not a model of excellence. While a poetic allusion to the tendency of humans to err was entirely appropriate in this case, where Loaiza's intent was at issue and the defense was that he had made an honest mistake, the further reference to divine forgiveness was unfortunate—inviting, as it did, the prosecutor's rejoinder that the task of the jury was to decide Loaiza's culpability, not to forgive him. But that lapse in no way compromised Loaiza's assertion he had believed the earlier, false applications had been submitted more than 10 years earlier and could hardly have prejudiced him in the eyes of the jury.

Counsel also improperly asserted in his closing that Loaiza needed to obtain a driver's license so he could find employment and support his family although no evidence of that fact had been presented. Again, although a mistake, it is not reasonably probable this misstatement affected the outcome of the case. To the contrary, had counsel introduced testimony that emphasized Loaiza's economic motivation to obtain a

license, the prosecutor would likely have argued this provided a strong incentive to once again present a false application the DMV, rather than arguing, as she in essence did, the jury should simply ignore the point.

In sum, Loaiza was entitled to a fair trial, not a perfect one (*People v. Anzalone* (2013) 56 Cal.4th 545, 556; *People v. McDowell* (2012) 54 Cal.4th 395, 442), and to reasonably competent counsel, not a flawless, let alone successful, defense. (See *Yarborough v. Gentry* (2003) 540 U.S. 1, 8 [124 S.Ct. 1, 157 L.Ed.2d 1] ["[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"]; see also *People v. Zikorus* (1983) 150 Cal.App.3d 324, 335; *People v. Wallin* (1981) 124 Cal.App.3d 479, 484-485.) In view of the strong evidence Loaiza intentionally stated the information on his applications was true even though he knew it was false, Loaiza was not prejudiced by any deficiencies in his counsel's trial performance.

3. *The Trial Court Erred in Imposing the Restitution and Parole Revocation Fines*

In sentencing Loaiza the trial court imposed a restitution fine of $1,200 pursuant to Penal Code section 1202.4, subdivision (b)(1), and the same amount as a parole revocation fine, stayed pending violation of parole, pursuant to Penal Code section 1202.45.[2] The court explained its calculations, "I'll impose the minimum restitution fine for each count, which is $300 per count, for $1,200. The parole revocation restitution fine is also $1,200."

Loaiza argues imposition of a $1,200 restitution fine was improper because the court intended to impose only the minimum statutory fine but mistakenly used $300, which was the minimum fine at the time of trial and sentencing, rather than $200, which was the minimum statutory fine at the time of his crimes in 2005 and 2006, and then compounded that error by imposing a separate fine for each count, which it aggregated,

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[2] "Under section 1202.45, a trial court has *no* choice and *must* impose a parole revocation fine equal to the restitution fine whenever the 'sentence includes a period of parole.'" (*People v. Smith* (2001) 24 Cal.4th 849, 953; see *People v. Vazquez* (2009) 178 Cal.App.4th 347, 355 [same].)

rather than a single fine for the "case" in which the convictions had been obtained. (See *People v. Soria* (2010) 48 Cal.4th 58, 64-65.) The Attorney General concedes the trial court erred when it referred to $300 as the minimum restitution fine and acknowledges the court could have imposed a total restitution fine of only $200 in this case. Nonetheless, the Attorney General argues Loaiza forfeited his objection to the restitution fine imposed because his counsel did not object in the trial court and contends he was not prejudiced by the error in any event because the court had discretion to set the restitution fine at an amount between the minimum of $200 and a maximum of $10,000.

Challenges to the imposition of restitution and parole revocation fines may be forfeited by failing to object in the trial court. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) When the trial court exercises discretion in making a sentencing decision, the defendant must object in the trial court to preserve the issue for appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303; see *People v. Smith* (2001) 24 Cal.4th 849, 852-853; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 ["appellate courts may not correct a 'discretionary sentencing choice' if the People failed to object at sentencing"].) When the sentence is unauthorized or in excess of jurisdiction, however, the forfeiture rule does not apply. (*Smith*, at p. 852.) When the error does "not involve a discretionary sentencing choice" and "is obvious and correctable without reference to any factual issues in the record or remanding for further findings," the sentencing error is "exempt from the waiver rule." (*Smith*, at p. 853; see *Talibdeen*, at p. 1153.)

It does not appear from the record here that the trial court exercised its sentencing discretion to impose a restitution fine $1,000 above the statutory minimum of $200. Rather, the court plainly intended to impose only the minimum statutory fine, but committed two fundamental errors in determining that amount: using the then-current minimum fine, rather than the statutory minimum at the time the offenses were committed, and multiplying the minimum fine by the number of counts on which Loaiza had been convicted. This was pure legal error, "obvious and correctable without

reference to any factual issues in the record." (*People v. Smith*, *supra*, 24 Cal.4th at p. 853.) Loaiza did not forfeit his objection, and the amount of both the restitution fine and the parole revocation fine must be reduced from $1,200 to $200.

**DISPOSITION**

The judgment is modified to reduce the restitution fine and the (stayed) parole revocation fine from $1,200 to $200. As modified the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

BLUMENFELD, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.